IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3102 OF 1989

1. M/s.Indian Express Newspapers (Bombay) Pvt.Ltd., a company retd. under the Companies Act having their regd.office at Express Towers, Nariman Point, Bombay - 400 021.

2. M/s.Indian Express (Madurai) Pvt.Ltd., a company incoprorated under the Companies Act, 1956, having their regd.office at Express Estate, Mount Road, Madras.

3. M/s.Andraprabha Pvt. Ltd., a company retd. under the Companies Act 1956, having their regd. office at Express Estate, Mount Road, Madras .. Petitioners.

V/s.

1. The Union of India, through the Ministry of Finance, New Delhi.

2. H. Narayanrao, Collector of Customs, Sahar Airport, Sahar, Bombay .. Respondents.

Mr.D.D. Madon, senior advocate with Mr.Vinayak Shete i/b. Poorvi Kamani for the petitioners.

Mr.S.S. Pakale with Mr.S.M. Shah for the respondents.

CORAM : H.L. GOKHALE &
J.P. DEVADHAR, JJ.

DATED : 8TH DECEMBER, 2005.

JUDGMENT (PER H.L. GOKHALE, J.) :

1. Heard Mr.Madon, senior advocate in support of this petition. Mr.Pakale appears for the

respondents.

2. The first petitioner herein is a company established under the Companies Act and carries on the business of printing and publishing newspapers including one known as Indian Express. The other two petitioners are its subsidiary companies. Some time in the year 1981-1983 the petitioners imported printing machineries of photo composing equipments with accessories and spare parts from M/s.Linotype Associates Pvt.Ltd., United Kingdom. In 1987, two show cause notices were issued to the petitioners by the Customs department, one was dated 19-20th October, 1987 and second was dated 11th December, 1987 alleging that there was under-invoicing in the price at which the machinery was imported in India. The petitioners sent their reply to the notices on 29th January, 1988 seeking time to file further reply and seek inspection of certain documents. In this reply, they mentioned that other newspapers had also imported identical equipments from the same manufacturer during the period in which the petitioners had imported the machinery. The newspapers mentioned were Times of India, Bombay, Hindustan Times, New Delhi, Ananda Bazar Patrika and Statesman, Calcutta and other newspapers. To this reply a further letter was addressed by the

respondents on 9th June, 1988 stating therein that the documents which are relied upon by the department will be made available but not the documents which are seized from other premises. The petitioners wrote once again on 17th January, 1989 drawing attention of the Collector of Customs specifically to Section 108 of the Customs Act and again repeating the same request.

3. It is material to note that in the first reply dated 29th January, 1988 the petitioners had alleged that the show cause notices were motivated and malafide and they were issued to harass them in view of their independent policy not liked by the then Government. In the letter of 17th January, 1989 names of 28 newspaper establishments were mentioned and it was stated that identical machinery had been imported by them from the same company in U.K. and there was no under-invoicing involved. Section 108 of the Customs Act was specifically invoked and a request was made to summon the representatives from these publishers with documents of import / letters of intent with M/s.Linotype Associates Pvt.Ltd., U.K. while importing the machinery. This was sought to establish that there was no under-pricing on the part of the petitioner. The application came to be rejected by the respondents by their letter dated 1st

April, 1989.

4. This led to the petitioners filing one writ petition bearing No.1080 of 1989 and an order in terms of minutes came to be passed before a learned Single Judge who heard the matter on 21st April, 1989 [Coram : Hon'ble Mr.Bharucha, J. as he then was]. It was agreed that the two show cause notices will be adjudicated by a single adjudicating authority and that fresh adjudication will be done.

5. It is material to note that after this first round of litigation, the petitioners thought that they will be given necessary information but the respondents maintained their stand and an order was passed on 26th June, 1989 holding that the application under Section 108 was rather premature and that the application under Section 108 would be taken up for consideration at an appropriate time and further that the cross-examination of the witnesses of the department may be completed first.

6. At this stage the petitioners moved another writ petition pointing out that in spite of the earlier order, their application seeking documents under Section 108 was not being decided and that now they will be required to proceed with the matter and

cross-examine the department's witnesses in absence of the information which they thought was necessary. This petition bearing No.1964 of 1989 reached before the same Judge (Hon'ble Mr.Bharucha, J.) on 4th August, 1989 and a statement was made by the then Additional Solicitor General that the second respondent shall pass an order on merits upon petitioners application dated 17th January, 1989 before proceeding further in the matter. That was specifically recorded in the order passed by the learned Single Judge and in view thereof, the petition was withdrawn.

7. It is so transpired that the respondents have proceeded with the same approach and have thereafter once again passed an order dated 11th October, 1989 rejecting the petitioners application dated 17th January, 1989. Interestingly enough, in para 4 the then Collector of Customs has observed that the applicant's request was not a bona fide request. This has lead to the petitioners filing the present petition which came to be admitted on 15th February, 1990.

8. This petition as it was originally filed sought to quash and set aside the order dated 11th October, 1989 through prayer clause (b). The

petition also sought a direction under prayer clause (a) that the respondents be directed to exercise their jurisdiction under Section 108 of the Customs Act, 1962 which was invoked under the application dated 17th January,m 1989 and to summon the persons and/or authorities referred in the said application. As stated above, the petition was admitted and has now reached for hearing after good number of years.

9. Mr.Madon, learned counsel appearing for the petitioners submitted that the aforesaid applications pointed out to the respondents that the petitioners had imported a machinery which was similar to some other 28 printing establishments and if information was sought from them, it could have been seen as to whether there was really any such under-invoicing in the import done by the petitioners. All these imports were made at the same time and, therefore, the request was a proper one, according to the petitioners. It is material to note that in the impugned order dated 11th October, 1989 there is reference to the petitioners letter dated 25th August, 1989 which was tendered during the hearing and wherein the petitioners had agreed to call the documents from any one of these sources. Surely, if what the petitioners were claiming was wrong, the same could have been established by calling

information from any one of these 28 establishments. It is also material to note that in the impugned order dated 11th October, 1989 there is a specific reference in para 2 to the petitioners request to get the information from Mr. B. Ramnathan, Managing Director of M/s.Linotype Associates India Pvt.Ltd., Mumbai. As noted above, all these requests were turned down.

10. Now, during the course of hearing of this petition, the petitioners have amended the petition and have placed on record panchanama dated 1st September, 1987 which records the search carried out at the office of M/s.Linotype Associates India Pvt. Ltd., Mumbai. Along with this panchanama is the list of files which were then seized and they are in all 21 in numbers. Amongst others, Sr.No.2 is the file containing correspondence with Rajasthan Patrika Pvt.Ltd., Sr.no.3 is correspondence with Times of India, Sr.no.7 and 10 to 14 is correspondence with Indian Express (petitioner), serial No.8 is correspondence with Malayala Manorama Co. Limited, Sr.No.15 is order file of Linotype Associates India Pvt.Ltd. Now as can be clearly seen these files contained correspondence with some of the newspapers whose names are amongst the 28 which were mentioned by the petitioners. Besides the order file of

M/s.Linotype Associates India Pvt.Ltd. was also available. Mr.Madon, therefore, submitted that surely if this information was available with the respondents, the same could have been made available during the proceedings either to establish the mischief which was alleged against the petitioners or which could have help them to prove their innocence. He submitted that principles of natural justice require this minimum fairness and when particulars of the parties were given and the documents were otherwise available with the respondents.

11. During the course of hearing before us, we asked the counsel for the respondents as to whether the documents could still be made available. Mr.Pakale appearing for the respondents took instructions from the Additional Commissioner of Customs who however by his letter dated 22nd November, 2005 informed him that since this was a very old matter pertaining to 1981-1985 there was every possibility of non availability of the record. He further stated in his letter that beyond five years, it may not be possible to get information from the records. In view of this reply from the respondents, the petition has been subsequently amended and certain submissions have been added with an additional prayer (b-1) that two show cause

notices at Exhibit ‘A’ and ‘B’ to the petition being dated 19/20th October, 1987 and 11th December, 1987 be quashed and set aside. Further affidavit-in-reply has been filed. In support of this amendment, Mr.Madon submitted that in as much as the respondents are not ready and willing to produce these documents, despite two orders passed earlier and in view of the fact that so many years have gone now, no prejudice should be caused to the petitioners whose defence will certainly suffer, if the show cause notices are allowed to proceed in absence of these documents. He submitted that the amended prayer was just and necessary in view of the change circumstances.

12. Mr.Pakale, learned counsel appearing for the respondents submitted that Section 108 of the Customs Act, 1962 is available only to the investigating officers and not for the defence. He secondly drew out attention to the petitioners letter dated 29th January, 1988 wherein initially they had sought only the inspection of the concerned documents. This is true but it is also relevant to note that thereafter the application was made on 17th January, 1989 seeking information under Section 108. This is because in any case the inspection sought was not offered. The third submission of Mr.Pakale was that the impugned order passed on 11th October, 1989 was

order on merits and the same had to be upheld.

13. We have heard submissions of both the counsel. What is material to note as far as the present case is concerned that right from the outset the petitioners were seeking information which according to them was necessary for them to defend the show cause notices. They had given specific particulars. It is not possible for the respondents to deny that the information was available to them and this is seen from the panchanama which records existence of necessary information and the same being available to the respondents on 1st September, 1987. It is also material to note that the second order passed by the learned Single Judge clearly directed the respondents to decide on merits the petitioners application dated 17th January, 1989 which had referred to Section 108 of the Customs Act, 1962. We may not go into wider question with reference to scope of Section 108 and as to whether the same would be available to the respondents in a show cause notice. However, in the facts of the present case, clear prejudice would be caused to the petitioners if the notices are permitted to be proceeded in absence of this material, particularly when the machinery was imported way back in the year 1981-83 and more than 22 years have gone by now. This is to be seen on the

background of the fact that the documents were very much available to the respondents as per the panchanama of 1987. Surely no purpose will be served by proceeding with the show cause notices now. If the enquiries on these show cause notices proceed in the absence of these documents, the defence which is necessary to the petitioners will not be available to them. Surely, such a proceeding will be hit by lack of fairness.

14. In these circumstances, we allow this petition and apart from setting aside the order dated 11th October, 1989 which is sought to be set aside by prayer clause (b), we grant prayer (b-1) also and quash and set aside two show cause notices dated 19/20th October, 1987 and 11th December, 1987. Rule is, thus, made absolute in terms of prayer clause (b) and (b-1). The writ petition stands disposed of in above terms. We are not making any order as to costs.

(H.L. GOKHALE, J.)

(J.P. DEVADHAR, J.)